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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 241

CONWAY C. CRAIG, BOB MCCRACKEN and TOM MULVANY,

Petitioners,

vs.

JOHN B. HARNEY, SHERIFF OF NUECES COUNTY, TEXAS

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS AND BRIEF IN SUPPORT THEREOF.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Conway C. Craig, Bob McCracken and Tom Mulvany respectfully petition for a writ of certiorari to the Court of Criminal Appeals of Texas to review its decision and judgment rendered on February 13, 1946 (R. 418; 449), in Ex parte Craig, et al., 193 S. W. (2d) 178, not yet officially reported.

A.

Summary Statement of the Matter Involved

Petitioners, the publisher, managing editor and a news reporter, respectively, of daily newspapers of general circulation in the City of Corpus Christi and in Nueces County, Texas, were accused in the county court of that county of contempt of court for publishing, in May-June, 1945, news accounts of, and an editorial commenting upon, the trial of a civil case in that court. The news accounts and editorial complained of were published when the civil case was pending, in the sense that the motion for new trial had not then been denied.

Petitioners were accused of attempting to "scandalize the court" and to influence the judge in acting upon the motion for new trial (R. 18), after he had instructed the jury to return a verdict for the plaintiff (R. 207). On June 4, 1945, while such motion was pending, the same county judge, acting upon a complaint filed on that day by a purported "officer of the court" entered a judgment *nisi*, adjudging petitioners guilty of contempt, and directing that they be summoned to appear on June 8, 1945, and show cause why the judgment *nisi* should not be made final (R. 26). By such judgment *nisi* petitioners were sentenced to serve the maximum prison term of 3 days in jail "unless they purge themselves thereof" (R. 26).

The motion for new trial in the civil case, a forcible detainer suit, was denied and judgment became final on June 6, 1945 (R. 209). At a subsequent term of

court, on August 3, 1945, the county judge, after hearing, entered the final judgment of contempt, based upon these findings: "the said reports and editorial,* considered in their entirety, by reason of inaccuracies contained therein, material matters omitted therefrom, emphasis on matters of evidence adduced at the trial of Cause No. 3624, and the inclusion in said articles and editorial of matters foreign to the record in said cause, were of a nature calculated to reflect upon the integrity of this Court, to embarrass this Court, to affect the course of justice and the rights of litigants in cause No. *5095*, to coerce and compel a judgment contrary to the law and the evidence in said cause No. *5095* and to block the administration of justice, and that the said news reports and editorial were intended so to do" (R. 81). (No. 5095 is the justice of the peace court number, No. 3624 the county court number.) Additional findings specified the way in which the three petitioners, respectively, were said to be implicated in the offense thus described (R. 82-83).

Making use of the only means afforded by Texas law of having the contempt judgment reviewed, petitioners, on the day of that judgment and while they were in custody of respondent sheriff (R. 226), applied to the Court of Criminal Appeals of Texas for

*The parts of the news reports and the parts of the editorial complained of appear in the opinion of the Court of Criminal Appeals (R. 420-424). Such news reports in full are at R. 359-360; 362-374; 380-383; 384-385. Since we do not agree with the Court of Criminal Appeals' interpretation of the editorial (a column entitled. The Crow's Nest, R. 378-380), we reproduce it in full as Appendix "A", post, p. 35.

writs of habeas corpus. The Court not being in session, temporary writs were granted by the Presiding Judge returnable to the full court (R. 10-11) which later, after hearing argument, adjudged that petitioners were guilty of contempt (R. 449). The majority of the Court held that petitioners were not protected by the freedom of the press guaranteed by the State and National Constitutions (R. 418-438). Judge Beauchamp, dissenting, without expressly mentioning the National Constitution, held that the publications were not contemptuous (440-449).

The Presiding Judge of the Court of Criminal Appeals granted a stay of execution pending disposition by this Court of this proceeding (R. 458).

B.

Jurisdictional Statement

1. The jurisdiction of the Court is invoked under Section 237(b) of the Judicial Code, as amended; 28 U. S. C. Section 344(b). The judgment of the Court of Criminal Appeals of Texas to be reviewed was entered on February 13, 1946 (R. 449). Rehearing was denied on April 3, 1946 (R. 457). The jurisdiction of this Court is sustained by the following cases: *Collins v. Texas*, 223 U. S. 288; *Daly v. Elton*, 195 U. S. 242; *Thomas v. Collins*, 323 U. S. 516; *Bridges v. California*, 314 U. S. 252; *Pennekamp v. Florida* (No. 473, October Term, 1945).

2. The Court of Criminal Appeals of Texas is not an intermediate court. It is the court of last resort

in Texas of all matters within its jurisdiction. Its judgments are not reviewable by the Texas Supreme Court or by any other Texas court.*

3. The constitutional question was raised by petitioners at their first opportunity and was pressed throughout. It was raised by Craig in his county court answer (R. 27), which was presented in support of petition for habeas corpus in the Court of Criminal Appeals (R. 1); raised and kept good in the same way by McCracken (R. 43, 8); and by Mulvany (R. 62, 9). That the question was properly presented in the Court of Criminal Appeals affirmatively appears by that Court's opinion: "Relators each applied to this Court for the writ of habeas corpus alleging in the main that the judgment was void and unenforcible because it was in contravention of the due process and freedom of the press provisions of our State and Federal Constitutions. It was

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*In view of the limitations upon the jurisdiction of the Supreme Court of Texas to issue the writ of habeas corpus the conviction could not be reviewed by that court; Ex parte Murray Jackson, 113 Texas 58. The Texas Supreme Court had jurisdiction of habeas corpus in Thomas v. Collins, 323 U. S. 516, since Thomas had been held guilty of contempt for violating an order of the district court in a civil case. Not so here. This case is within the jurisdiction expressly conferred by the Texas Constitution on the Court of Criminal Appeals. Art. 5, Sec. 5. "As applied to the law of contempt, the term 'jurisdiction' has a peculiar significance." Ex parte Miller, 91 Tex. Cr. Rep. 607, 609; 240 S. W. 944, 945. "On habeas corpus, therefore, it must appear not only that the tribunal which rendered the judgment was vested with power to enter a judgment of contempt, but also that it had jurisdiction, upon the facts before it, to render the particular judgment upon which the relator is held." Ibid. 91 Tex. Cr. Rep. at 610; 240 S. W. 946.

by reason of the particular conditions thus existing that we granted the writs" (R. 419). Further, said the Court: "It is contended by relators that the Fourteenth Amendment to the Federal Constitution applies to the States the same standard relative to freedom of press and speech as under the First Amendment are applicable to the Federal government, * * *" (R. 432).

4. The questions presented are substantial: *(a)* Petitioners have been adjudged guilty of contempt for the publication in daily newspapers of news reports and an editorial comment concerning a forcible detainer suit in the county court of Nueces County, Texas, while a motion for new trial was depending, upon law questions. Notwithstanding the fact that it plainly appears that the newspaper publications did not present a clear and present danger of subverting the mind of a judge of reasonable fortitude, the Texas Court of Criminal Appeals has adjudged that petitioners were guilty of contempt of court. While professing to apply the rule enunciated in the *Bridges* case, the Court has really applied the rule announced in the majority opinion in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, and in *Craig v. Hecht*, 263 U. S. 255. After quoting from *Craig v. Hecht* (R. 589-590), the Court adopted and almost literally copied the conclusions of Judge Killits as summarized by Chief Justice White in the *Toledo Newspaper* case, 247 U. S., at 414-415 (R. 437). This is in conflict with the *Bridges* and *Pennekamp* cases and with the dissenting opinion of Justice Holmes in the *Toledo Newspaper case*, ex-

pressly approved by this Court in the *Bridges* case, 314 U. S., at 273; 278. *(b)* Petitioners were convicted of contempt for an alleged scandalizing of the county judge. This is condemned by the entire Court in the *Bridges* case. The county judge having no lawful power to impose summary punishment on such ground, his action in so doing would vitiate the judgment, even if it were not otherwise condemned by the decisions of this Court in the *Bridges* and *Pennekamp* cases. *Thomas v. Collins*, 323 U. S. 516, 529.

C.

The Questions Presented

Whether petitioners have been deprived of their right of freedom of the press guaranteed by the Fourteenth and First Amendments to the United States Constitution:

First, by applying, under the guise of the "clear and present danger" test, the "tendency" rule of *Toledo Newspaper Co. v. United States*, 247 U. S. 402.

Second, by not sustaining the defense that there was no immediate and clear danger of coercing a judge of reasonable fortitude.

Third, by rejecting as a defense the truth of the news reports, where, as here, petitioners were accused of committing contempt "by means of" false reports of the trial.

Fourth, whether such constitutional guaranty has been infringed where the conviction for contempt and consequent punishment are predicated in part upon an alleged scandalizing of the accusing judge, absent a charge, a finding, and proof that the alleged scandalizing was an effective means of intimidation.

D.

Reasons Relied on for Allowance of the Writ.

1. *The decision of the Court of Criminal Appeals of Texas in this case is not in accord with the decisions of this Court in Bridges v. California, 314 U. S. 252, (1941), and Pennekamp v. Florida, No. 473, October Term, 1945; decided June 3, 1946.*

(a) The court below, paying formal deference to the *Bridges* decision, announced that the publications complained of presented a clear and present danger of compelling the trial judge to change his ruling on motion for new trial. After quoting with approval from *Patterson v. Colorado*, 205 U. S. 463; and from *Craig v. Hecht*, 263 U. S. 255, the court below adopted (R. 437) as grounds for its conclusion the basic findings of Judge Killits, as condensed by Chief Justice White, in *Toledo Newspaper Co. v. United States*, 247 U. S. 402. In his dissenting opinion in that case Justice Holmes held that this was inadequate support for a judgment of construc-

tive contempt. The dissenting opinion in that case was approved and the majority view was rejected by this Court in the *Bridges* case, 314 U. S. at 273; 278. The Texas Court of Criminal Appeals in this case, while acknowledging the binding force of the *Bridges* rule, has applied the "tendency" test, in conflict with it.

(b) The decision in this case is in further conflict with the *Bridges* and *Pennekamp* decisions in that the court below has taken no account of the standard applicable to the accusing judge. The court below did not find, nor would the facts support a finding, that the publications presented a clear and present danger of overthrowing the mind or the will of a judge of reasonable fortitude. No judge worthy of the name could have been coerced by the publications of which complaint is made in this case.

(c) The charge of contempt was predicated in part upon an alleged scandalizing of the court; and upon that ground, at least in part, the judgment of guilt was founded and the punishment assessed. In the judgment *nisi* the county judge found that "the purpose of this representation * * * was intended and calculated to reflect upon the integrity of the court, and bring it into disrepute and prejudice and influence the court in its ruling on the aforesaid motion for a new trial, and that the said publications and circulations were made for the purpose and with

the intent of scandalizing the court * * *" (R. 26). The county judge finally adjudged that "said reports and editorial, considered in their entirety, by reason of inaccuracies contained therein, material matters omitted therefrom, * * * were of a nature calculated to reflect upon the integrity of this Court, to embarrass this Court, to affect the course of justice, * * * and to block the administration of justice," etc. (R. 81). In the *Bridges* case this Court held unanimously that merely scandalizing the court cannot be punished as constructive contempt. This vitiates the entire judgment. *Thomas v. Collins*, 323 U. S. 516, 529.

2. *The decision below was arbitrary and should be reviewed by this Court.*

The petitioners were charged in the complaint (R. 18) and in the judgment *nisi* with having committed contempt "by means of false statements, omissions, distortions and overemphasis;" (R. 26). Upon this ground they were convicted and punishment was assessed (R. 81). The Court of Criminal Appeals held "it is no defense that the publications were true" (R. 431). Judge Beauchamp, dissenting, held that the news reports were essentially true, and that, in the circumstances, this was a complete defense (R. 444).

Wherefore, your petitioners pray that a writ of certiorari be issued under the seal of this Court, directed to the Court of Criminal Appeals of Texas, to the end that this cause may be reviewed and determined by this Court; and that the judgment of the said Court of Criminal Appeals be reversed by this Court, and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

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No.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

Preliminary Statement

The opinions below ~~(R. 418) are~~ unofficially reported, *Ex parte Craig, et al.*, 193 S. W. (2d) 178. Statement of the Matter Involved, Jurisdiction, and the Questions Presented appear in the foregoing petition for writ of certiorari.

II.

Summary of Argument

Point 1. The decision of the Court of Criminal Appeals of Texas upholding the conviction of petitioners for contempt of court has deprived the petitioners of their right of freedom of the press guaranteed by the Fourteenth and First Amendments of the National Constitution as construed by this Court in *Bridges v. California (Times-Mirror Co. v. Superior Court)*, 314 U. S. 252 (1941), and in *Pennekamp v. Florida* (No. 473, October Term, 1945, decided June 3, 1946). While acknowledging the binding force of the "clear and present danger" test, the court below has not applied it, but instead has applied the "tendency" test as announced and applied in *Toledo Newspaper Co. v. United States*, 247 U. S. 205.

Point 2. There was no contempt of court since the publications created no clear and present danger of coercing a judge having normal stamina or reasonable fortitude.

Point 3. Petitioners were charged with having contemned the court "by means of" false news reports (R. 18; 26). This was the basis of the judgment of conviction (R. 145). In these circumstances the petitioners presented a complete defense by showing that the news accounts were essentially true.

Point 4. The punishment was imposed, at least in part, for scandalizing the court. This vitiates the entire judgment.

III.

ARGUMENT

Point 1

Petitioners have been deprived of their right of freedom of the press guaranteed by the United States Constitution in that, under the guise of applying the "clear and present danger" test the court below has applied against them the "tendency" test and has decided the case on the theory of Toledo Newspaper Company v. United States, 247 U. S. 205.

The Court of Criminal Appeals declared that courts and judges "are open to criticism for their acts as are all other officials. Such is the right guaranteed by our State and Federal Constitutions of freedom of the press and speech. But when newspaper publications are made during the pending of a case in court and reach the point of interfering with the due administration of justice in the courts of this State, they cease to be protected by those constitutional guarantees. Liberty of the press and freedom of expression must not be confused with license or abuse of that liberty." (R. 428.) What did the Court mean by "interference with the due administration of justice," and with "license" as distinguished from liberty? The answer is revealed by the immediately succeeding statement quoted by the court below from Chief Justice Taft's concurring opinion in *Craig v. Hecht*, 263 U. S. 255, 278, as "sustain-

ing the views just expressed"; namely, "* * *; but it is also essential that courts and judges should not be impeded in the conduct of judicial business by publications having the direct tendency and effect of obstructing the enforcement of their orders and judgment, or of impairing the justice and impartiality of verdicts. * * * If, however, the publication is intended and calculated to obstruct and embarrass the court in a pending proceeding in the matter of the rendition of an imparfial verdict, or in carrying out its orders and judgment the court may, and it is its duty to, protect the administration of justice by punishment of the offender for contempt." (R. 428-429.)

In support of the conclusion that truth of the publications is no defense, the court below then quoted a portion of the opinion in *Patterson v. Colorado*, 205 U. S. 454, which condemned the publication there under review on the ground that "it would tend to obstruct the administration of justice, * * *." And as if to conclude the matter the court below quoted the rule said to be "announced" by 6 *R. C. L.*, p. 508, Sec. 20, that truth is not a defense "when the article tends to impede, embarrass or obstruct the administration of justice." (R. 431.) If it be thought that the court intended to limit such expressions to the contempt issue as tested by local law, the United States Constitution apart, we refer to this statement in the paragraph of the opinion immediately following the above: "The issue before us is not whether Judge Browning's ruling (in the forcible detainer

suit) was correct or incorrect, but whether the publications relating thereto were reasonably calculated to interfere with the due administration of justice in that case." (R. 431.) If by "the issue before us" the court meant the issue without regard to the National Constitution, the context nonetheless shows that the court's ultimate disposition of the Federal question was induced by its fixed notions about "the issue before us" as above expressed.

The issue before the court was approached by first considering and expressing approval of the rule announced in *Toledo Newspaper Co. v. United States*, 247 U. S. 402 (cited at R. 428); in *Craig v. Hecht*, and *Patterson v. Colorado*. Having announced its own adoption of the "reasonably calculated" or "inherent tendency" rule, the court acknowledged its obligation (within limits) to yield to the superior force of this Court's interpretation of the Federal Constitution, as announced in the *Bridges* case. "It becomes necessary, then," said the court, "to analyze the holding in the *Bridges* case, and, if applicable and controlling, to follow it." (R. 432.)

Having completed the analysis, which the court had approached on the footing that the *Bridges* decision "is a precedent only in cases involving similar fact situations" (R. 432) the court rejected the *Bridges* case "as precedent" on the ground that the facts were different. "These fact elements distinguish the *Bridges* case, *supra*, from the instant case and render it uncontrolling, here, on the facts." (R. 435.) "However," said the court, "the rule of 'clear and present danger,' as announced in the

Bridges case, *supra*, is controlling here. It is in the light of that rule, then, that we are ultimately to decide this case." *Ibid.* Thus insulated, the court proceeded to expose itself to the aura of "clear and present danger," uncontaminated by the atmosphere of *Bridges* facts.

The court dealt broadly and summarily rather than analytically with this phase of the problem. First, the court said that considering the publications in their entirety and chronologically "there is no escape from the conclusion that it was the purpose and intent of the publishers thereof to force, compel and coerce Judge Browning to grant Mayes a new trial." (R. 436.) This charge of "purpose and intent" will be further answered in the argument under Point 2, *post*, where we show, as we think, that the court's recombination of phrases has changed the contextual meaning. From this base of wrongful "purpose and intent" the court proceeded with facility to its conclusion that the publications were not only reasonably calculated to accomplish that purpose, "but there was also a 'clear and present danger' that they would and the likelihood that such result would follow was 'extremely serious' and the degree of 'imminence' extremely high.'" (R. 436.) Again, the court's conclusion rests upon what was deemed a menacing purpose:

"Such conclusions are made manifest because the publications and their purpose were to impress upon Judge Browning (a) that unless he granted the motion for a new trial he would be subjected to suspicion as to his integrity and fairness and to odium and hatred in the public mind; (b) that the safe and se-

cure course to avoid the criticism of the press and public opinion would be to grant the motion and disqualify himself from again presiding at the trial of the case; and (c) that if he overruled the motion for a new trial, there would be produced in the public mind such a disregard for the court over which he presided as to give rise to a purpose in practice to refuse to respect and obey any order, judgment or decree which he might render in conflict with the views of the public press." (R. 437.)

Let the above explanation of how the court's conclusions were "made manifest" be compared with the restatement, *per* Chief Justice White, of the conclusions of Judge Killits in *Toledo Newspaper Co. v. United States:*

"(a) Because * * * their manifest purpose was to create the impression on the mind of the court that it could not decide in the matter before it in any but the one way without giving rise to such a state of suspicion as to the integrity or fairness of its purpose and motives as might engender a shrinking from so doing. (b) Because the publications directly tended to incite to such a condition of the public mind * * * that if the court, acting according to its convictions, awarded relief, it would be subject to such odium and hatred as to restrain it from doing so. * * * And (d) because the publications were of a character, not merely because of their intemperance, but because of their general tendency, to produce in the popular mind a condition which would give rise to a purpose in practice to refuse to respect any order which the court might render if it con-

flicted with the supposed rights of the city espoused by the publications." (247 U. S. 414-415.)

The court below had previously stated that the *Bridges* decision is not binding as precedent since the facts are different. Specifying, the court said, first, "No threats are involved in the instant publications." (R. 435.) Whereas it said that in the *Bridges* case the issue turned upon the fact that the publications "carried threats of future adverse criticism and action on the part of the publishers in the event the disposition made in the case was not in keeping with the views of the publisher," all of which the judge might reasonably have expected because of the publisher's well known attitude. (R. 435.) So, we are told in effect that because there were no threats against Judge Browning, the *Bridges* case is "uncontrolling, here, on the facts"; and because there were threats against Judge Browning [as in (a), (b) and (c) above, pp. 18-19], there was "clear and present danger" and hence the *Bridges* case is uncontrolling on the law.

Another, although secondary, difference as viewed by the court, rendering the *Bridges* case "uncontrolling, here, on the facts," is said to be the presence of public interest in the Los Angeles litigation, whereas, it is said "the public, as such, had no interest in the outcome of" the detainer suit at Corpus Christi. Thus, while absence of public interest at Corpus Christi rendered the *Bridges* case uncontrolling as precedent, still the threat of public revolt if Judge Browning "overruled the motion for a new trial" was a clear and present danger that was "ex-

tremely serious" and the degree of imminence was "extremely high." (The threat of such revolt is depicted in (c) above, p. 10.) And so, we are told, the present record is at once devoid of threats and of public interest and suffused with threats, including threat of public revolt.

Support for the court's explanation of how its conclusions were "made manifest," under the head of (a), (b) and (c), above, pp. 18-19, is not to be found in either the complaint (R. 12), the county judge's findings (R. 81-83), or the articles in context (R. 359-385). If the facts were substantially identical with those in the *Toledo Newspaper* case, authority for the court's conclusions could be found, in the way above indicated, in the majority opinion in the *Toledo* case, which applied the "tendency" test. (Justices Holmes and Brandeis dissenting.) Even if it be assumed that *Nye v. United States*, 313 U. S. 33, has left in the *Toledo Newspaper* majority opinion a remnant of authoritative precedent, it can hardly be claimed that the Killits conclusions, resting upon the "tendency" doctrine, have survived both the *Bridges* and the *Pennekamp* decisions. Unless it can successfully be so claimed the judgment below is devoid of viable support.

Point 2

The publications created no clear and present danger of coercing a judge having normal stamina or reasonable fortitude.

To say that the publications complained of were dangerous to the administration of justice in the

forcible detainer suit is to imply that Judge Browning was seriously wanting in firmness of character or independence. It was not so charged, nor did either of the Texas courts so find, and the record does not show it. Besides, since it is not claimed that petitioners were aware, or sought to take advantage, of any such deficiency or weakness of the judge, the questions at issue are determinable upon the assumption that none existed. Otherwise a given publication about a case will be protected by the Constitution or not, depending upon the strength or weakness of character of the presiding judge. This means that if he is respectably so equipped the Constitution is effective. If not it is ineffective. The Constitution becomes an inconstant, meaning one thing if a given statement is made about a case pending in one court, and the opposite if made about a similar case pending in an adjoining county, or in another court in the same county.

As we view the complaint, it charges contempt "by means of" false representations. We deal with that under Point 3, where it seems more appropriate to discuss specifically the news reports. Under the present point we direct attention to the editorial. The single editorial involved, a column entitled The Crow's Nest, is reproduced in full as Appendix A, post, p. 35. The part complained of (R. 14-15) and embodied in the judgment *nisi* (R. 22-23) is in italics. The italicized part is of different import from the whole. But the difference is even wider between the natural meaning of the whole and the meaning extracted from it by the court below, as abridged and translated in its opinion (R. 436). This

part of the court's opinion we reproduce as Appendix B, post, p. 38. We respectfully submit that the court below has mistaken the meaning of the editorial, and it is apparent that its ultimate conclusion was induced by that obvious misconception, as witness: "The only reason or motive for so doing [attempting to compel Judge Browning to grant a new trial] was because the publishers did not agree with Judge Browning's decision or conduct of the case. According to their viewpoint Judge Browning was wrong and they took it upon themselves to make him change his decision" (R. 436). The editorial itself says the opposite: "The Lookout, himself a layman, doesn't have the slightest idea whether the decision reached in this particular case is supported by legal authority. There is no way of knowing whether justice was done, because the first rule of justice, giving both sides an opportunity to be heard, was repudiated." (R. 380, post, p. 37.)

First, the editorial advocates two reforms: (a) amendment of an archaic provision of the state constitution which permits the office of county judge to be occupied by other than a lawyer; (b) amendment of the statute conferring upon the county court final appellate jurisdiction of forcible entry and detainer suits. Since leasehold rights, without limit as to value, and irrespective of the duration of the estate, are determinable in that manner, the jurisdiction is neither petty nor simple. Obvious reasons are abundant for thinking that both reforms are overdue. Was the press at liberty, under the Constitution, to select this appropriate occasion to make

these constructive suggestions in the public interest? We submit that *Bridges v. California, supra*, at 268, answers in the affirmative.*

Second, the editorial was critical of what the author regarded as a palpable breach by Judge Browning of the duty resting upon him "to hear the other side." This, we submit, was, in the circumstances, a natural, fair-minded layman's reaction. Defendants' counsel had presented a motion for a directed verdict, upon which the judge had heard extended argument, pro and con, and had then overruled it. Plaintiffs' counsel, at a later stage, presented a motion for directed verdict, when the questions were not identical with those theretofore discussed. The judge refused to hear defendants' counsel in opposition, and granted the motion at once. This action of the judge was characterized in open court by counsel for the defendants as "arbitrary" (R. 213). For this, counsel was not reproved. The court paid no attention to it. We submit that the court was without lawful power to punish summarily the petitioners for saying in the press substantially what, the judge acquiescing, had been said by counsel in open court.

The court after referring to the publication in the

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*Compare Nelles and King, Contempt by Publication, XXVIII Columbia Law Review, at pages 552, 553: "The important doings of courts are rarely either interesting or intelligible to laymen. The time when they may best command attention is while they are going on. * * * Public discussion outside of court-rooms, at such times as it is most likely to command attention, is the nearest we have to a practical means of working for consistent judicial respectability."

news reports of resolutions passed by groups of citizens, commented that all of this was to show "that by reason of the attitude of the publishers towards Judge Browning's ruling and decision as reflected in the editorials, public opinion had become aroused and was demanding that a new trial be granted in the case because, in agreement with the viewpoint of the publishers, Judge Browning's ruling was wrong." (Appendix B, post, p. 39). The court has misinterpreted the publishers' attitude "as reflected in the editorials." There was only one. The author of the editorial carefully refrained from taking issue with Judge Browning's ruling and decision. The statement in the opinion that petitioners demanded a new trial because of their viewpoint that "Judge Browning's ruling was wrong" finds no support in, but is contradicted by, the editorial. The writer did criticize Judge Browning's method of conducting the trial. What he said was that he had no idea "whether the decision reached in this particular case is supported by legal authority." Further: "There is no way of knowing whether justice was done." The criticism was pointedly directed at the want of a fair hearing, as distinguished from an erroneous result. The writer was explicit in limiting his criticism to the violation of what he described as "the first rule of justice, giving both sides an opportunity to be heard." He stated, both affirmatively and negatively, more than once, that he did not profess to say whether the ultimate decision was right or wrong. The judgment of conviction, based upon an imagined criticism of Judge Browning's decision as being

wrong rests upon an utterly mistaken view of the facts.

The court has read into the editorial an unexpressed warning to the judge that future support would depend upon his reversing his former ruling and deciding the case the other way. The editorial carries no such threat, or effort at persuasion, subtly or otherwise. On the contrary, it tells the judge plainly enough that at all events, regardless of the outcome of the forcible detainer suit, the editorial writer, if opportunity offers, will favor the election of a competent lawyer to the office of county judge. It offers no tempting reward to Judge Browning on any terms, other than such as might emanate from his own conscience. Was this dangerous to the administration of justice? In principle the *Bridges* and *Pennekamp* decisions, and Justices Holmes and Brandeis in the *Toledo Newspaper* case have answered in the negative.

As for the resolutions adopted by the veterans organizations and kindred groups, it is not charged that these were approved editorially, or that they were misrepresented in the news columns. They expressed the opinion that the defendant, who was in the armed service, had not had a fair trial, and at least one resolution suggested that a new trial be granted and that Judge Browning then recuse himself and let an impartial judge re-try the case. The impression thus expressed accords apparently with that of a number of persons who were present at the trial; as witness the expressions and conduct of the jury in refusing, on Saturday, to sign the verdict as directed by the

court (R. 419); and was hardly more critical than were the statements of counsel for defendant made in open court without reprimand or other admonitory action by the court. (R. 217; 374.) The sponsors of at least one of these resolutions directed that it be presented to Judge Browning (R. 182), and it was mailed to and received by him (R. 224).

Finally, the interpretation placed by the appellate court upon the statement made by petitioner McCracken at the end of the contempt hearing in response to the question from the bench as to whether defendants desired to purge themselves is unwarranted. The court of appeals treated the statement as an admission of an attempt to compel Judge Browning to grant a new trial, in that the petitioner said that he did hope that the editorial would cause the judge to search his conscience, and act with greater care. If this be dangerously subversive, then the lines drawn in the *Bridges* and *Pennekamp* cases, and by Justice Holmes in the *Toledo Newspaper* case have somehow been contracted. Besides, the court's interpretation of the single expression lifted from the context of the McCracken statement is another example of the way in which petitioners have been victimized by that process throughout. For convenient reference we reproduce the whole of the statement as Appendix C, post, p. 39.

Point 3

Petitioners having been convicted of contempt "by means of" allegedly false news reports, they presented a complete defense by showing that the news accounts were essentially true.

The judgment *nisi*, after reproducing extracts from the newspapers, charged that the articles, all together, "were calculated and intended to falsely represent to the public the nature of the proceedings had, and to compel a different result on the hearing of a new trial." This was immediately followed by specific charges of false statements, misrepresentations, omissions and overemphasis. Then, that "these articles, in their entirety and standing alone and together, were wilfully and knowingly written, published and circulated by the persons aforesaid for the purpose of presenting to the reading public *by means of false statements, omissions, distortions and overemphasis*, that in its essence the action was one brought by corrupt and unlawful parties to unlawfully, improperly and unjustly deprive a patriotic citizen, unable because of his service to his country, to defend himself, of his rights in and to valuable property, and that counsel for plaintiffs and the court aided and abetted the corrupt parties aforesaid in the furtherance and accomplishment of this purpose, and that the citizenry generally of Corpus Christi and Nueces County did as a result of the publication and circulation of these articles believe that the actions of the plaintiffs, their counsel and the court were in fact corrupt, improper and unlawful." (R. 26.) (Our emphasis.)

Obviously, the false statements, omissions, distortions and overemphasis referred to in the paragraph just quoted were those which had been specified immediately preceding it in R. 24-25. The part of th

complaint above quoted is immediately followed by the concluding paragraph of the complaint, this single sentence:

"Affiant would further show the court that the purpose of this representation to the citizenry of the city of Corpus Christi and County of Nueces was intended and calculated to reflect upon the integrity of the court, and bring it into disrepute *and prejudice and influence the court in its ruling on the aforesaid motion for new trial*, and that the said publications and circulations were made for the purpose and with the intent of scandalizing the court, and intended to influence or overawe its deliberations in said pending cause, *and were made at a time and under circumstances calculated to affect the force of justice in said proceedings*, and were so calculated to do and were intended for that purpose." (Then follows immediately the judgment of guilt *nisi*. R. 26. Our Italics.)

The Court of Criminal Appeals has lifted from the last quoted paragraph the italicized parts, and, by recombining them with others, also extracted, has reconstructed what it designates a single charge, selected, so it says, from "various reasons whereby it was claimed that the articles mentioned constituted contempt of court." The so-called single charge discussed by the court is thus stated: "that the articles when taken together and considered as a whole 'were calculated and intended to falsely present to the public the nature of the proceedings had and to compel a different result on the hearing of the motion for a new trial' and to 'prejudice and influence the court in its ruling on the aforesaid motion for a new trial

* * * and were made at a time and under circumstances calculated to affect the force of justice in said proceedings * * *.'" (The omissions are the court's, not ours.) (R. 424.)

The county judge interpreted the complaint, in accord with our understanding of it as above stated, as charging contempt of court "by means of," or, as he expressed it, "by reason of" false reports. He found that the reports and editorial, "by reason of" inaccuracies, omissions, emphasis and inclusion of foreign matters, were "of a nature calculated to" accomplish the alleged wrong as specified by him. (This basic finding (R. 81) is quoted in full in the Summary Statement in the foregoing petition, page 3.)

The court below declined to consider the defense that the newspaper articles were substantially true. We recognize that truth is not a complete defense in all cases without exception. For example, no one should be permitted to apprize a jury by extra-legal means of prejudicial facts not in evidence. But this case does not fall within any such exception. Here, the gravamen of the offense as charged was the accomplishment of a wrongful end "by means of" a false report to the public of the facts of the trial.

As Judge Beauchamp's opinion suggests (R. 443-444) Judge Browning's notion that petitioners had published a misleading report of the trial of the detainer suit was induced by his erroneous conception of the controlling question of law in that case. He thought that, perforce a forfeiture provision for non-payment of monthly rental in advance, such failure to make timely payment put an end to the lease. He

erroneously gave to such forfeiture clause the effect of a provision marking the duration of the estate granted (R. 210).

Under his view of the law, the dispute could have been ended in a brief pre-trial conference, or the case could have been tried in less than an hour instead of consuming two days. This, for the reason that it was undisputed that the full amount of the monthly rental was not paid on the day when due. But it was undisputed that the default was caused by a mistake, and contributed to by the misleading conduct of others. In the circumstances equity would allow no such forfeiture. *Benavides v. Hunt*, 79 Texas 383; *Randolph v. Mitchell* (Tex. Civ. App.), 51 S. W. 297; *Creamery Dairy Co. v. Electric Park Co.* (Tex. Civ. App.), 138 S. W. 1106; *Mactier v. Osborn*, 146 Mass. 399; *Gordon v. Richardson*, 185 Mass. 492; *Cole v. Johnson*, 120 Iowa 667. Besides, under Texas law the covenant for rent was not effective to limit the term or duration of the estate. *Waggoner Estate v. Sigler Oil Co.*, 118 Texas 509.

This shows that Judge Beauchamp (R. 443-444) was right in concluding, also, that the conviction of contempt was not sustained since it was predicated upon a charge that the newspaper articles "by reason of inaccuracies, * * * were of a nature calculated * * * to coerce and compel a judgment contrary to the law and the evidence" (R. 81).

Freedom of the press, as restricted by the decision below, means that a news reporter incurs the risk of summary punishment if he fails to interpret and report the facts of the trial in accord with the notions

of the trial judge concerning the controlling questions of law. Under that abridged liberty, if the reporter, acting in good faith, interprets the facts in a way that fails to vindicate the trial judge's conclusions of law, he may be laid by the heels for contempt. The *Pennekamp* decision is contra.

Point 4

The element of the judgment which imposes punishment for scandalizing the court vitiates the entire judgment.

In the judgment *nisi* petitioners were found guilty of contempt on the ground, *inter alia*, that "said publications and circulations were made for the purpose and with the intent of scandalizing the court * * *" (R. 26). For this they were sentenced to serve three days in the county jail "unless they purge themselves thereof" (R. 26). In the final judgment of the county court petitioners were adjudged guilty of contempt because "said reports and editorial, considered in their entirety, by reason of the inaccuracies, * * * were of a nature calculated to reflect upon the integrity of this Court, to embarrass this Court, to affect the course of justice and the rights of litigants in Cause No. 5095 [the forcible detainer suit] * * *" (R. 81). Motion for new trial in the detainer suit was overruled on June 6, 1945 (R. 209). The judgment *nisi* in the contempt proceeding was rendered on June 4, 1945 (R. 19). The final judgment in the contempt proceeding was

rendered in August, 1945 (R. 83), after the judgment in the detainer suit had become irretrievably final at a former term of court (R. 81). At the end of the contempt hearing, and before judgment was pronounced, the county judge inquired whether the petitioners desired to purge themselves of contempt. In response to such inquiry the McCracken statement was made to the court, which he introduced by explaining that he did not know what was meant by purging in a case of that kind. The entire statement is in Appendix C, post, p. 39.

If Judge Browning was not satisfied with the McCracken statement (adopted by the other petitioners) it is obvious that what he wanted was retraction and apology. The judge's willingness to accept at that date such a purging reveals his interest in an expiation of the so-called scandalizing offense, and renders apposite this question by Mr. Justice Holmes, taken from his dissenting opinion in *Craig v. Hecht:* "how can it be pretended that the charge obstructed the administration of justice when the judge seemingly was willing to condone it if the petitioner would retract?" (263 U. S., at 281.)

There were not two separate penalties, one for supposedly obstructing justice, and the other for scandalizing the court. There was a single sentence of imprisonment for scandalizing the court and attempting to obstruct justice. Even if, contrary to fact, it be assumed that the record supports the latter, the entire judgment is vitiated by the penalty

for scandalizing the court. *Thomas v. Collins*, 323 U. S. 516, 529.

Conclusion

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

The Crow's Nest

Judge and Jury

The week-end incident in county court lends force to a frequently made argument that the judge should be a lawyer. A layman occupying its bench is bound to end up in hot water sooner or later when he is sitting on a case where fine points of law are argued. Probably the basic fault lies with the Texas constitution and statutes which vest judiciary authority in a county judge but which do not require the occupant of the office to be an attorney. The office is filled, not only in Nueces, but in many other Texas counties, by a layman.

The incident around which the present controversy rages involves such a case. Bush M. Jackson, agent, employed a technicality in seeking to break the lease of Pvt. Joe L. Mayes of the United States Army on a ground floor location in the old Elks Club building where Mayes operated a cafe. Mayes contends that his lease is still in force.

The case was heard by a jury before County Judge Joe D. Browning. Expert counsel represented the principals. About the only knowledge that Browning, a layman, has with court procedure has been gained during his occupancy of the office. Obviously, he has an even more sketchy knowledge of the points of law which opposing attorneys were arguing.

Yet he instructed the jury to return a verdict for the plaintiff. The jury twice ignored his orders and

decided for the defendant. Only when the defendant's counsel advised its members that they were obliged to follow the judge's instruction did they comply, and then with a notation that they were violating their conscience.

One-Sided Opinion

Browning's behavior and attitude has brought down the wrath of public opinion upon his head, properly so. Emotions have been aggravated. American people simply don't like the idea of such goings on, especially when a man in the service of his country seems to be getting a raw deal.

But that's not the point. A better objection to the judge's decision deals with a more fundamental issue.

When the testimony was in, the defense counsel offered a motion for an instructed verdict for his client. He was required, as is the custom, to give his authority, and arguments against were made by the plaintiff's attorney. The judge overruled the motion after hearing both sides.

Then the plaintiff's counsel offered a motion for an instructed verdict for his client. It was granted immediately, without having him cite his authority or without giving the defendant's attorney a change to argue against it.

That was the travesty on justice, the judge's refusal to hear both sides. That's where a legal background would have served him in good stead. It is difficult to believe that any lawyer, even a hack, would have followed such high handed procedure in instructing a jury. It's no wonder that the jury balked and public opinion is outraged.

Knowledge Essential

The fact that a serviceman is involved lends drama to the event. But it could have happened to anyone, it can happen to anyone, with a layman sitting as judge in a case where fine points of law are involved. True, the idea that only lawyers are qualified to occupy most public offices has been run into the ground, and in most instances a competent layman would be better qualified, but the county judge's office is an exception. He should be a competent attorney as well as a competent businessman.

It's the tragedy in a case of this sort that the court where the controversial decision was handed down is the court of last resort. It's too bad that appeal can't be made to a district court and heard by a judge who is familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel and to make his decisions accordingly.

The Lookout, himself a layman, doesn't have the slightest idea whether the decision reached in this particular case is supported by legal authority. *There is no way of knowing whether justice was done, because the first rule of justice, giving both sides an opportunity to be heard, was repudiated.*

He only knows that respect for the court's ability to mete out justice has been badly shaken, a result that can make for a dangerous condition. Qualified jurists must occupy our benches. Men of conscience must be encouraged to sit on our juries.

This column is written for the Caller by Bob McCracken. Opinions expressed are those of the writer and do not necessarily reflect the policy of this news-

paper. (R. 378. Italics indicate the part copied in the complaint, R. 14-15, and in the opinion of the court below, R. 421-422.)

APPENDIX B

(The part of the opinion of the court below which interprets and appraises the above editorial, Appendix A)

"When the several publications in the instant case are considered together and in their chronological order of appearance, there is no escape from the conclusion that it was the purpose and intent of the publishers thereof to force, compel, and coerce Judge Browning to grant Mayes a new trial. The only reason or motive for so doing was because the publishers did not agree with Judge Browning's decision or conduct of the case. According to their viewpoint, Judge Browning was wrong and they took it upon themselves to make him change his decision. To accomplish that end, Judge Browning's action in instructing the jury, without hearing argument on the motion, was editorially denounced as a "travesty on justice" and "high handed"; as properly bringing "public opinion down on his head"; as outraging "public opinion"; as a "tragedy" that the case could not be appealed to another judge who was "able to interpret and weigh motions and arguments of opposing counsel and to make his decisions accordingly"; and as a repudiation of the "first rule of justice," as a consequence of which "there is no way of knowing whether justice was done."

Following, and in connection with, the editorials, news items were published showing that a certain group of citizens had passed a resolution denouncing the decision as a "gross miscarriage of justice." Other news items followed, showing that three different groups of citizens were petitioning or circulating petitions calling on Judge Browning to grant Mayes a new trial in the case and to "permit the case to be re-tried by another judge"—all to show that by reason of the attitude of the publishers toward Judge Browning's ruling and decision, as reflected in the editorials, public opinion had become aroused and was demanding that a new trial be granted in the case because, in agreement with the viewpoint of the publishers, Judge Browning's ruling was wrong." (R. 436.)

APPENDIX C

[Statement made by McCracken (concurred in by the other petitioners) at the end of the contempt hearing, in response to the question by Judge Browning as to whether they desired to purge themselves] (R. 425.)

"I can speak only for myself. Without knowing the meaning of purging a contempt, especially in a case of this kind, and not being guilty of any contempt as I concede [conceive], I can only say this:

"I think that the impression created upon the mind of the public by all that was said in our papers about the Jackson-Mayes trial was the same impression that would have been created upon the mind of

an average intelligent layman who sat through the trial.

"It was the same impression that would have been created if the entire proceedings could have been published. In saying this, I do not impute unworthy motives to anyone; I do not undertake to judge motives.

"Moreover, I do not profess to know or presume to advise how the case should have been finally decided.

"It was my hope that the Crow's Nest published in the papers would quicken the conscience of the judge. I wanted him to search his conscience. It was my hope that what I said would make him more careful in discharging his duty. I think my column was calculated to have that effect upon a conscientious judge.

"As I saw it then, and as I see it now, the statements in the papers could not have the effect of overthrowing the will or undermining the conscience of the judge. They could have no such effect upon any judge worthy of the name. I assumed that the judge would understand that he, and he alone, would have to decide the law as he understood it.

"I would not bring our courts into disrepute. Indeed, in the long run, their standing before the bar of public opinion is determined by the courts—and by them alone—but I would do what I can to help them always to perform their high and solemn duties.

"If, in this instance, I have gone about it in a way that has needlessly wounded sensibilities, I am sorry for that, but I do not conceded [conceive] that anything that I have done gives your honor license to punish me for it." (R. 425.)